Supreme Court, U.S.
FILED
MAR 31 1998
CLERK

(4)

No. 97-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE BRONX HOUSEHOLD OF FAITH, JACK ROBERTS AND ROBERT HALL,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10 AND CHARLES WILLIAMS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

JORDAN W. LORENCE*
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, Virginia 22031
(703) 359-8619

JOSEPH P. INFRANCO
MIGLIORE & INFRANCO
353 Veterans Mem. Hwy.
Commack, New York 11725
(516) 543-3663

**Counsel of Record*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

WP

TABLE OF CONTENTS

I. THIS COURT SHOULD GRANT REVIEW AND REVERSE THE SECOND CIRCUIT'S REPEATED AND ERRONEOUS INTERPRETATION OF THIS COURT'S EQUAL ACCESS DECISIONS 1

A. The Second Circuit Permits School Districts to Exclude Religious Worship and Instruction in Conflict with This Court's Equal Access Decisions. 1

B. This Court Strongly Indicated in *Lamb's Chapel* That New York Law Created a Public Forum in New York's Public Schools, Which Conflicts With The Second Circuit's Repeated Rulings to the Contrary. 4

C. The School District's Policy Excludes Religious Services and Instruction, and Permits Almost All Other Expressive Activities. 6

II. THE CHURCH SEEKS EQUAL ACCESS TO THE SCHOOL FACILITIES, NOT TO ESTABLISH A "PERMANENT" PRESENCE IN THE SCHOOL 8

III. THIS COURT SHOULD REAFFIRM THAT THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY A POLICY BANNING RELIGIOUS SERVICES AND INSTRUCTION FROM A FORUM GENERALLY OPEN FOR MEETINGS BY COMMUNITY GROUPS 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:

Board of Education v. Mergens,
496 U.S. 226 (1990) 10

Chess v. Widmar,
635 F.2d 1310 (8th Cir. 1980) 2, 3

Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library,
883 F.2d 32 (5th Cir. 1989) 3

Deeper Life Christian Fellowship v. Board of Education,
852 F.2d 676 (2d Cir. 1988) 1

Fairfax Covenant Church v. Fairfax County School Bd.,
17 F.3d 703 (4th Cir. 1994) 3

Grace Bible Fellowship v. Maine School Admin. Dist. No. 5,
941 F.2d 45 (1st Cir. 1991) 3

Gregoire v. Centennial School District,
907 F.2d 1366 (3rd Cir. 1990) 3

Hays County Guardian v. Supple,
969 F.2d 111 (5th Cir. 1992) 4

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) ..... 4, *passim*

Lamb's Chapel v. Center Moriches Union Free School District,
959 F.2d 381 (2d Cir. 1992) 1, 4

Lemon v. Kurtzman,
403 U.S. 602 (1971) 10

Perry Education Association v. Perry Local Educators' Assoc.,
460 U.S. 37 (1983) 2, 3

Rosenberger v. Rectors and Visitors of the Univ. of Virginia,
515 U.S. 819 (1995) 10

Travis v. Owego-Apalachin School District,
92 F.2d 688 (2d Cir. 1991) 1

Widmar v. Vincent,
454 U.S. 263 (1985) ..... 1, *passim*

STATUTES:

New York Education Law §414 ..... 2, *passim*

I.

THIS COURT SHOULD GRANT REVIEW AND REVERSE THE SECOND CIRCUIT'S REPEATED AND ERRONEOUS INTERPRETATION OF THIS COURT'S EQUAL ACCESS DECISIONS

A. The Second Circuit Permits School Districts to Exclude Religious Worship and Instruction in Conflict with This Court's Equal Access Decisions.

In its Brief in Opposition, the Board of Education of the City of New York ("School District") fully embraces the doctrinal errors of the Second Circuit in interpreting this Court's equal access doctrine as spelled out in *Widmar v. Vincent,* 454 U.S. 263 (1981) and its progeny. The School District insists that the Constitution permits it to open its school buildings on weekends and week nights to a wide variety of community groups, but also to exclude religious services and instruction. This is a fundamental violation of the First Amendment which the Second Circuit has now upheld four times, including this case. *See Deeper Life Christian Fellowship v. Board of Education,* 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District,* 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel v. Center Moriches Union Free School District,* 959 F.2d 381, 387 (2d Cir. 1992).

The Second Circuit has openly refused to conform its case law to conform with this Court's decisions. This Court should grant review and reverse the Second Circuit's faulty First Amendment analysis.

The policy in this case reads almost exactly like the one this Court declared to be a public forum for student speech in *Widmar.* The policy at issue in *Widmar* permitted meetings for

"political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980).

The School District's policy in this case, based on N.Y. Education Law §414, allows nonschool groups to meet for "social, civic and recreational" purposes, and "for such other uses as may be authorized by law." Policy 5.6.2 and 5.6.6; Cert. Pet. App. 52a. The School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; Cert. Pet. App. 53a-54a.

This Court has ruled that a forum generally open to the public is a public forum, not a limited forum:

> The Constitution forbids a State to enforce certain exclusions from a forum **generally open to the public** even if it were not required to create the forum in the first place.

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983) (emphasis added). The School District must justify any exclusion from its forum by the compelling state interest standard. "'Where the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification....," *Widmar*, 454 U.S. at 268.

At least five other federal appeals courts have consistently applied these standards to rule that forums opened generally for civic, cultural, recreational purposes (or similarly-worded policies) create public forums, and that exclusions of religious expression from those forums violate the First Amendment. *See*

Grace Bible Fellowship v. Maine School Administrative District No. 5, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990); *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994); *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989) and *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980). The School District attempts to distinguish these cases by pointing to superficial differences between them and this case, but the School District avoids the main point why the Church calls attention to them: All five directly conflict with the Second Circuit's opinion here because they all applied *Widmar* to mean that a forum opened by policies very similar to the one in this case create public forums. Those courts also found that the exclusions of religious expression from those forums were unconstitutional.

In contrast, the School District argues that it has created only a "limited forum." The School District misstates this Court's equal access doctrine -- "[b]y enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes." Brief in Opposition at 9. There is no Supreme Court decision which has ever stated such a principle of law, and no other court of appeals has ruled that way. Under the School District's circular reasoning, its forum is limited because it restricts religious services and instruction. But this Court has ruled that a forum is defined by what it includes, not what it excludes. If the forum is opened generally to community groups for expressive activities, then any exclusions are judged by the compelling state interest test. A forum is limited if it is restricted for "use by certain groups," *Perry*, 460 U.S. at 55, n.7; or limited to "the discussion of certain subjects," *id.*

The Fifth Circuit, following this Court's lead, has refuted

the School District's defective argument that any exclusion converts a forum into a limited forum:

> Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech. **The Supreme Court has not adopted such circular reasoning.** (Citations omitted).

Hays County Guardian v. Supple, 969 F.2d 111, 117 (5th Cir.1992) (emphasis added).

This Court should grant review and correct the Second Circuit's repeated erroneous interpretations of this Court's equal access decisions.

B. This Court Strongly Indicated in *Lamb's Chapel* That New York Law Created a Public Forum in New York's Public Schools, Which Conflicts with the Second Circuit's Repeated Rulings to the Contrary.

Bronx Household of Faith ("the Church") repeats that this Court dropped an "anvil-like hint" in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993) that New York Education Law §414 creates a public forum in the New York public schools and that the Second Circuit erred by ruling that the state law created only a limited forum with a permissible exclusion of religious worship and instruction.

The School District said that the Church is wrong because it selectively quoted from this Court's decision in *Lamb's Chapel*. Therefore, the Church quotes the relevant passage in its entirety to show that the Church has accurately relayed the Supreme Court's disagreement with the Second Circuit's repeated rulings on the public forum issue:

> The Church argued below that, because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks. Hence, its view was that subject matter or speaker exclusions on District property were required to be justified by a compelling state interest, and to be narrowly drawn to achieve that end. *See Perry, supra*, at 45; *Cornelius, supra*, at 800. Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations**, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses. 959 F.2d, at 387.[fn5] We need not rule on this issue, however, for even if the courts below were correct in this respect and we shall assume for present purposes that they

were, the judgment below must be reversed.

Lamb's Chapel, 508 U.S. at 391-92 (emphasis added).

This Court stated that the argument with "considerable force" is the one stating that "the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks."

This Court did not say in *Lamb's Chapel*, as the School District argues, that the issue of prior religious use of the school was the argument having "considerable force." This passage from *Lamb's Chapel* clearly mentions the "prior religious use" argument only in passing and found that the Second Circuit had possibly ruled incorrectly on that point. The School District misreads this portion of *Lamb's Chapel* to avoid this Court's skepticism about the validity of the Second Circuit's "limited forum" reasoning.

This Court should grant review in this case and state straight out what it implied in *Lamb's Chapel* that the Second Circuit has erred in its earlier rulings; that New York Education Law §414 creates an open forum at the public school buildings during nonschool hours; and that the exclusion of religious services and instruction from the forum is an unconstitutional content-based exclusion that violates the First Amendment.

C. The School District's Policy Excludes Religious Services and Instruction, and Permits Almost All Other Expressive Activities.

The School District erroneously criticizes the Church's statement that the policy excludes religious services and

instruction, and little else. The School District wrongly claims that the policy also prohibits "other possible uses ... not listed in the statute, including political meetings, commercial uses, labor union meetings and the meetings of fraternal organizations, such as the Elks or Lions." Brief in Opposition at 10.

This is incorrect. New York Education Law §414 permits political meetings if they are authorized by the school board. Cert. Pet. App. 49a-50a. The state law also permits meetings by fraternal organizations, such as the Elks or Lions, and only prohibits them from charging admission if the proceeds flow directly to the fraternal organization. Cert. Pet. App. 49a. Labor unions may meet in the forum under the School District's forum. Policy 7.2.2; Cert. Pet. App. 54a. As for the ban on commercial activity, neither the state law nor the School District's policy mentions it, let alone defines it. Whether this alleged prohibition excludes nonexpressive commercial activity or protected commercial speech is unclear. Therefore, in practice, the School District's policy excludes religious services and instruction, but little else from its forum. Because the School District permits such a wide array of groups to meet in its schools, it has created an open forum. The content-based exclusion of religious services and instruction must be judged by the compelling state interest test. *Widmar*, 454 U.S. at 270.

This Court should grant review in this case and reverse the Second Circuit's incorrect interpretation of the First Amendment that government creates a "limited forum" if it restricts one kind of speech, no matter how many other forms of speech and viewpoints it permits in the forum.

II.

THE CHURCH SEEKS EQUAL ACCESS TO THE SCHOOL FACILITIES, NOT TO ESTABLISH A "PERMANENT" PRESENCE IN THE SCHOOL

The School District erroneously states that the Church seeks to locate permanently in the public school building. The record flatly contradicts that assertion. The Bronx Household of Faith purchased a piece of land on July 7, 1994 in the neighborhood to construct a church building sometime in the future. Second Circuit Appendix A-108, ¶5. The Church now meets in a crowded house, which it has been doing since 1971. Second Circuit Appendix A-107 and A-108. The Church needs some transition time in a larger facility in order to increase its membership so that the Church will have the financial resources to construct a building on the land it bought. *Id.* The Church has no desire to remain permanently in a school building. Remaining in a school gives the appearance that the Church is transitory and not a settled member of the community. *Id.* A school building is not a long term solution to the Church's building needs because it cannot store equipment at the school, decorate it, etc. *Id.* This is not a case of a religious body locating permanently in a government building.

Importantly, the School District's policy permits "permanent" location by any group in its school buildings. The Church seeks the same access to the buildings that the School District permits for secular community groups. Under the School District's policy, community groups can arrange for meetings, even weekly meetings for one year at a time. Second Circuit Appendix A-20. The organization must seek renewed permission every year. *Id.* The Church desires to have access to the public schools on the same conditions as everyone else. The Church is no more "permanently located" in the public

school than are the Boy Scouts, the Crotona Coalition or any other organization that meets weekly at the schools.

The School District also raises the red herring that if the Church gains access to the school building, it will inevitably demand to post a sign at the school or store equipment in the building. Brief in Opposition at 22. But the policy now does not give any community group the right to do those things. The Church could not demand a right to do something not authorized under the policy. If the policy is changed in the future to allow all groups to post signs outside the schools announcing their meetings, or to store equipment at the schools, the First Amendment would require that religious groups receive equal treatment. There is no "creeping threat" from a religious specter here.

This Court should grant review in order to clarify that giving religious organizations equal access to government-controlled meeting facilities open to meetings by all other groups, does not violate the Establishment Clause.

III.

THIS COURT SHOULD REAFFIRM THAT THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY A POLICY BANNING RELIGIOUS SERVICES AND INSTRUCTION FROM A FORUM GENERALLY OPEN FOR MEETINGS BY COMMUNITY GROUPS

This Court should grant review and restate that the Establishment Clause does not justify a policy singling out religious services and instruction for exclusion from a forum generally open to all community groups. This has been the clear holding of this Court in *Widmar* and related cases, such

as *Lamb's Chapel, Board of Education v. Mergens,* 496 U.S. 226 (1990) and *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819 (1995), among others.

The School District claims that the Church never raised the argument at the Second Circuit that the policy violates the Establishment Clause. Brief in Opposition at 26. This is incorrect. On pages 38-40 of its opening brief to the Second Circuit, the Church argued extensively that the policy violates the Establishment Clause, as it has in the cert petition.

The School District's policy also results in excessive entanglement with religion in violation of the three-prong Establishment Clause test announced in *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971). School officials must unconstitutionally evaluate whether the meeting includes prohibited religious worship or instruction, or accepted religious discussion.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

JORDAN W. LORENCE*
NORTHSTAR LEGAL CENTER
P.O. Box 2074
Fairfax, Virginia 22031
(703) 359-8619
*Counsel of Record

JOSEPH P. INFRANCO
MIGLIORE & INFRANCO
353 Veterans Mem. Hwy.
Commack, N.Y. 11725
(516) 543-3663

March 30, 1998